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Supreme Court of the United States

No. 229—OCTOBER TERM, 1963

ROBERT WEBER,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

This brief is submitted in opposition to the petition for certiorari to the United States Court of Appeals, Second Circuit, seeking review of a judgment of that Court which reversed an order of the District Court, Southern District of New York, and dismissed a writ of habeas corpus. The Court of Appeals denied petitioner's motion for rehearing by order dated May 10, 1963.

Reported below: 316 F. 2d 603.

Petitioner was convicted of robbery second degree in the Court of General Sessions, New York County, on June 6, 1950 and was sentenced to five to ten years' imprisonment. On September 21, 1953 he was paroled. He was returned to State Prison March 25, 1960 as a parole violator as a result of which his maximum expiration date was extended to June 23, 1964, subsequently extended by his release as ordered by the District Court.

Subsequent to his parole, in the fall of 1959 petitioner was observed on several occasions driving a car without permission, in violation of his parole agreement (28a, 58a, 65a-66a),* and was under the surveillance of the New York City Police Department in connection with several robberies in Brooklyn, where he then resided. On February 25, 1960 one Andreyev, presently in Federal prison, was arrested and the police found on his person the key to a safe-deposit box in petitioner's name (41a, 58a). Accordingly, that morning petitioner was questioned by police, in the presence of his parole officer. The Division of Parole lodged a warrant against him at that time for consorting with criminals, and, in the course of the questioning, the parole officer, Joseph Sullivan, asked him to explain the fact that he had deposited large sums of money—$1,100 in one recent week—in his bank account (42a). Petitioner's response was that he "was a gambler." When Sullivan asked him for some proof of this gambling, petitioner admitted that he had been arrested for gambling while on parole (42a).

Subsequent investigation by the police revealed that petitioner had in fact been arrested for disorderly conduct on December 17, 1955 during a raid on a dice game and had been convicted and fined in Night Magistrates Court, Borough of Manhattan, New York City, on that date (32a-33a; Resp. Exhs. 2, 3). No fingerprints had been taken either upon arrest or at the Court (64a). Despite the express requirement in his parole agreement that he inform his parole officer of any arrests or convictions, it is undenied that petitioner had not at any time disclosed this incident during the four years since its occurrence (32a-33a, 42a, 64a).

Since both the conviction itself and its concealment constituted serious breaches of the parole agreement—in addi-

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* Unless otherwise indicated, numbers in parentheses refer to pages in respondent's appendix in the Court of Appeals.

tion to the subsequent violations of driving and consorting in 1959—the Division of Parole declared petitioner delinquent as of December 17, 1955 (the date of the gambling conviction), pursuant to New York Correction Law § 218. He was returned to State Prison March 25, 1960 as a parole violator, charged with four years, two months and twenty-eight days' delinquent time. The addition of this delinquent time extended his maximum expiration date to June 23, 1964 and, after a statutory parole court hearing, held at Sing Sing Prison on April 20, 1960, he was ordered held until that date. The hearing was presided over by three Commissioners of the Division of Parole, and petitioner there testified at length, admitting that he breached his parole by illegally driving a car, but denying commission of the gambling offense which he had previously admitted to his parole officer (42a).

Prior Proceedings

Thereafter petitioner applied for habeas corpus in the New York Supreme Court, Dutchess County, asserting that the Division of Parole was without jurisdiction to declare him a parole violator on the grounds that (1) he had not in fact been convicted on December 17, 1955 and (2) that the revocation of his parole was invalid since the conviction was a public record and the Division's alleged laxity in not discovering it sooner amounted to a waiver. After a plenary hearing at which petitioner and parole officer Sullivan testified; by order dated November 28, 1960 the Court dismissed the writ, holding there was no showing of lack of diligence since "it cannot be said that the Parole Board had reasonable cause to believe that Weber had violated his parole before * * * March, 1960." Cited in a subsequent proceeding, *People ex rel. Weber v. Division of Parole*, 212 N.Y.S. 2d 761, 764 (Sup. Ct., Westchester Co., 1961), aff'd 15 A. D. 2d 499 (2nd Dept., 1961), lv. to app. den. 11 N. Y. 2d 642 (1962), cert. den. 369 U. S. 890 (1962).

With regard to the claim of waiver, the Court found "not a bit of evidence * * * that the parole board or its parole officer knew about the gambling and the arrest for disorderly conduct at any time before February 25, 1960." *People ex. rel. Weber* v. *Division of Parole, supra*, 212 N.Y.S. 2d 761, 764.

Petitioner did not appeal from this decision but brought a proceeding in the nature of mandamus under Article 78, Civ. Prac Act, in Supreme Court, Westchester County, raising the identical claims, which was likewise dismissed with a lengthy opinion expressly holding that the issue of petitioner's identity could not be reviewed, absent a showing of violation of some statutory duty on the part of the Parole Board, and that petitioner had failed to meet that burden, 212 N.Y.S. 2d 761, 762-763. It is significant that petitioner was represented by counsel in all these state court proceedings and that he failed to claim at any time that his rights under the Sixth Amendment, or any constitutional provision, had been violated. That case was, as we showed, carried all the way up to this Court.

The instant proceeding then was commenced in the Southern District of New York and a writ was issued by NOONAN, D. J., on October 31, 1962. On November 20, 1962 a hearing was held at which both sides presented testimony.

The Hearing and Decisions Below

At the hearing, petitioner testified that he was paroled September 26, 1953 and that on February 25, 1960 a parole violation warrant was lodged against him "for delinquency alleged on December 17, 1955, on alleged dice game arrest" (19a). He stated he was detained pursuant to that warrant for fifteen days, after which he was questioned by parole officers who promised to release him if he divulged certain information, which he refused to do (21a). At this

time, he testified, he denied involvement in any dice game on the date in question (22a).

Thereafter, at the parole violation hearing held on April 20, 1960, petitioner stated he was again asked to give "certain people's names" and again refused, and likewise reiterated his denial of the dice game and arrest (23a-24a, 26a).

On cross-examination, petitioner admitted that in 1955 he resided at 230 West End Avenue, New York City (26a). This, coupled with the fact that he was thirty years of age in 1955 (19a), coincides exactly with the records of his arrest and conviction (32a; Resp. Exhs. 2, 3), which expressly show that a Robert Weber, thirty years of age, white, and of that address, was arrested and pleaded guilty to disorderly conduct. It is to be noted that petitioner was *not* fingerprinted at the time of this arrest.

Petitioner conceded that he violated his parole by driving a car without the permission of his parole officer in 1959 (28a) and that he admitted this at his parole violation hearing (37a-38a).

Sullivan, the parole officer assigned to the supervision of petitioner from 1957 to the time of his arrest in 1960, testified that on February 25, 1960 he received a call from a New York City detective, Thomas Swift, advising him that petitioner had been arrested. He stated (41a-42a):

> "At the same time they had picked up a well known burglar who had a key to a safe deposit box that was registered to Robert Weber's name. So at that time I took out a warrant for his association and I went to the Safe and Loft Squad and after they finished questioning him I lodged a warrant against him.
>
> Now, during the questioning I questioned him about his finances and he had deposited, I believe it was $1,100 in a week. I asked him about this and he said

> he was a gambler. So I asked him how he could prove he was a gambler.
>
> He said, 'Well, I took a couple of pinches while on parole,' and the police checked this out and they came up with the arrest on December 17, 1955. But that was the first time I knew of his arrest, the morning of February 25, 1960."

Sullivan explicitly stated that petitioner had never informed him of his arrest or conviction—itself a violation of the parole agreement (42a; Resp. Ex. 1, Q. 16). He testified that, when he confronted petitioner with the arrest records showing the gambling charge, petitioner stated that, " 'I can't recall being arrested. I remember being picked up' " (42a). Sullivan testified he then lodged the parole violation warrant against petitioner (43a; Resp. Exh. 4).

On cross-examination, Sullivan explained the procedure followed when a parolee is arrested, noting that in cases where fingerprints are taken, the New York City Police Bureau of Criminal Identification informs the Division of Parole within a day that a parolee has been apprehended. He specifically testified (53a):

> "[I]f he is arrested and he is fingerprinted, I usually know the following morning."

Here, however, Sullivan stated, since petitioner had not been fingerprinted upon his arrest, "it would be very difficult [to know of the arrest], unless somebody told us that he was arrested * * *" (54a).

The Court itself noted (55a):

> "[Sullivan] said nobody would ever know it unless fingerprints were taken, not from the arrest record alone."

Richard Fowler, petitioner's parole officer from April 1955 to May 1956, expressly testified that petitioner had

never informed him of any arrest or conviction during this period, which encompassed the day of his arrest (64a). He stated that no fingerprints were received from the police or any other agency during the period of his supervision of petitioner indicating any arrest or conviction of petitioner (64a).

The final witness, Thomas Swift, the New York City police detective, told of the circumstances of petitioner's 1960 arrest, noting that he had been observed driving a car in violation of his parole agreement for several months prior thereto (65a-66a). Swift, in addition, told of petitioner's admission of the parole violation to Sullivan and himself, bolstering Sullivan's testimony (66a), and likewise explained that petitioner's arrest was the direct result of the apprehension by federal authorities of Andreyev, the burglar who had a key to petitioner's safe-deposit box (72a).

It is undisputed that petitioner was not fingerprinted upon his 1955 arrest for gambling, so that, until he admitted it to his parole officer upon his subsequent questioning in 1960, the Parole Board had no way of knowing of it. Thus, any contention that the Board failed to use diligence is utterly unsubstantiated by any testimony.

Yet, on December 3, 1962 the District Judge rendered an oral decision sustaining the writ and ordering the release of petitioner (81a-88a). He found the Parole Board "should have known, or in fact did know, of the existence of the arrest of this defendant in December, 1955, but delayed for one reason or another to retake him into custody" (85a).

The Court concluded that the asserted delay was violative of petitioner's constitutional rights under the Sixth Amendment, since (85a):

> "where, as here, the state *knows or should have known* of this petitioner's gambling arrest in 1955 (which he denies), and waited more than four years before re-

> voking his parole and then extends the parolee's prison termination date, this court is of the opinion that such is an undue delay within the rationale of [the Sixth] amendment, if not specifically enunciated by it." (Emphasis supplied)

The District Court did, however, reject petitioner's claim that he was not in fact arrested in 1955, since it felt it "should not consider the quantum of proof before the Parole Board" (85a). It based its entire decision on the theory that the alleged lack of diligence of the Parole Board was violative of the Sixth Amendment—a conclusion which, we urge, lacks *any* basis either in fact or in law.

The Court of Appeals, Second Circuit, unanimously reversed the District Judge's order and dismissed the writ, by order dated May 1, 1963 (316 F. 2d 603). The opinion by MARSHALL, Cir. J., expressly rejected the factual findings of the lower Court, noting that (p. 605):

> "[t]here was no direct testimony or evidence in the District Court to suggest that the Board of Parole had any knowledge whatsoever of Weber's 1955 arrest and conviction until he admitted their existence when he was questioned on February 25, 1960; moreover, there was uncontroverted testimony that it was only upon Weber's admission that the parole officials learned of his arrest and conviction for the first time. On this state of the record, the District Court's finding of fact that the Board of Parole knew of Weber's arrest and conviction before he admitted their existence in 1960 is clearly erroneous and may not do service as an alternate foundation for a holding of lack of diligence on the part of the State." (Citing cases.)

The Court rejected the view advanced by petitioner that the Board of Parole in some way "should have known"

of the existence of the gambling conviction although petitioner concededly did not disclose it—itself a violation of his parole agreement and a ground for revocation of his parole. It held (p. 606):

> "Since Weber was not fingerprinted in connection with the 1955 proceedings, the Board of Parole did not learn promptly that a parolee had been arrested and convicted, as it would have learned the very next day if fingerprints had been taken. Nonetheless, it is true, as the District Court pointed out, that the Board of Parole could have learned earlier of Weber's arrest and conviction by examining the records of the Magistrate's Court. However, the imposition of such a duty of inspection would be both unreasonable, because of the enormous task that the Board of Parole would face in maintaining a constant check on the hundreds of criminal courts in the State of New York in which its thousands of parolees might happen to be convicted, and unwise, because the failure of the Board to make timely discovery of a conviction would result in automatic forfeiture of its statutory right to revoke the parole of a prisoner, even when the parolee had deliberately violated his agreement to report any convictions to the Board. Under the circumstances of the present case—in which the State would have learned of Weber's 1955 conviction promptly if Weber had lived up to the terms of his release on parole—we decline to announce that the Board of Parole had the duty to search the records of the Magistrate's Court upon pain of forfeiting the right to act for lack of diligence."

Significantly, the Court of Appeals specifically based its decision "upon the narrow ground that there is no support in the record for the finding of lack of diligence by the State in instituting the parole revocation proceedings against Weber. We therefore obviously have no

occasion to reach or pass upon the question of whether such lack of diligence, in circumstances in which it was clearly demonstrated, would constitute a denial of due process to a parolee." 316 F. 2d, at page 606.

Thus, far from raising a "major issue [of] the applicability of the Fourteenth Amendment to the hearing of a parole court," as petitioner would have us believe (Pet. for Cert., p. 12), the decision of the Court of Appeals was in fact based on the "narrow ground," to use the Court's own phrase, that the *facts* adduced below failed to support the District Judge's finding of a lack of diligence. The Court explicitly left open the question of law as to whether lack of diligence by a parole board, where proven, would constitute a denial of due process. Rather than a broad legal issue, we have here an unusual factual situation and a decision predicated on a failure of proof at the hearing.

ARGUMENT

The decision below was predicated solely on the factual issues involved and presents no substantial question worthy of consideration by this Court.

Petitioner contends the District Court erred in "declin[ing] to consider [his] proof that he had not committed the violation and that the Parole Board hearing was constitutionally inadequate" (Pet., p. 2). In point of fact, there was no "proof that [petitioner] had not committed the violation" at all. The testimony showed that a man giving his name as Robert Weber, with the same age and address, was arrested and convicted on December 17, 1955 (32a-33a). In addition, petitioner's parole officer and the police detective testified he had admitted gambling arrests during this period (42a, 66a). Even

were we to assume, *arguendo*, that the District Court had the power to relitigate the factual basis for a finding by the Parole Board that a State prisoner had violated his parole, there is ample evidence to more than offset petitioner's self-serving declarations of innocence and to sustain the Board's findings. Of course, both Courts below agreed that the quantum of proof before the State Board of Parole did not constitute a federal issue to be litigated on habeas corpus, and this is unquestionably correct. *Lopez* v. *Madigan*, 174 F. Supp. 919 (D. C. Calif.); *U. S. ex rel DeLucia* v. *O'Donovan*, 107 F. Supp. 347 (D. C. Ill.); *Yaire* v. *Bell*, 180 F. 2d 198 (6 Cir.).

Contrary to petitioner's claim; either the commission of a criminal offense, or failure to disclose an arrest or conviction, violates the parole agreement and constitutes grounds for revocation of parole. The record contains ample proof that petitioner committed the offense—both his admission and the conviction certificate. The failure to disclose the arrest and conviction until years later is conceded. Thus petitioner's insistence that he did not admit the conviction (Pet., pp. 9-10) is immaterial in the light of the testimony of the parole officer and the detective that he admitted the arrest in 1960 (42a, 66a), and the testimony of his prior parole officer that he concealed it at the time (64a).

Petitioner makes much of our failure to call the officer who had arrested him in 1955, one Parotta (Pet., pp. 10-11). If he deemed Parotta's testimony helpful petitioner could have subpoenaed him at the District Court hearing, at which he was represented by counsel of his choice, and during which he was undeniably aware of Parotta's name (77a). If Parotta did not testify petitioner may not be heard to complain. None of these factual issues show any defect or unfairness in the hearing of a scope which would bring this case within the principle of *Townsend* v. *Sain*, 372 U. S. 293, as petitioner asserts. This

claim is rendered somewhat ironic by the fact that petitioner was successful in obtaining his release at the very hearing which he now urges to have been unfair.

It is misleading to state that the certificate of conviction was "prepared on December 9, 1960—five years later" (Pet., p. 11). The certificate was transcribed from the records of the Court which were entered on the date of the conviction in 1955, and was certified as an accurate copy by the Clerk of the Court.

Clearly, the finding of the Court of Appeals that petitioner failed to prove any lack of diligence on the part of the parole authorities is a *factual* finding. The Court explicitly rested its decision on that "narrow ground" and the question "whether such lack of diligence, in circumstances in which it was clearly demonstrated, would constitute a denial of due process to a parolee" was expressly left open by the Court of Appeals. 316 F. 2d at page 606. Thus the question of the applicability of the due process clause to a parolee is not properly before this Court. The decision sought to be reviewed rested on a factual determination and the Court of Appeals did not have to, and did not in fact, rule on the constitutional question which petitioner is attempting to inject into this case.

The other claims advanced by petitioner are hypertechnical and have little to do with the real issues with which the courts below dealt. There is no issue in this case of "receipt in evidence of a statement * * * allegedly made during an illegal arrest," as petitioner claims (Pet., p. 13). The arrest was legal since the police had reason to believe petitioner had been involved in burglaries and the safe-deposit box of the burglar Andreyev was found to be in petitioner's name (41a, 58a, 67a). N. Y. Code Crim. Pro. § 177. Surely the police, who had had petitioner under surveillance for some time (66a-67a), had reasonable cause to believe a felony had been committed (by petitioner's associate Andreyev) and that petitioner was involved in it.

Petitioner never challenged the legality of his arrest below, and it may not be reviewed by habeas corpus in any event. *U. S. ex rel. Spinch* v. *Ragen*, 246 F. 2d 264 (7 Cir.). At no time in any of these proceedings has petitioner ever claimed that his admission was coerced in any way. Indeed, he denies that he ever made the admission at all. No evidence was unlawfully obtained through search or seizure, so that petitioner's reliance on *Mapp* v. *Ohio*, 367 U. S. 643, is misplaced. Similarly, *Wong Sun* v. *U. S.*, 371 U. S. 471, is irrelevant to the instant case. It concerned itself with a plainly illegal arrest by *Federal* agents for a Federal crime—transporting narcotics—and held that admissions made by the defendants at the time were inadmissible in a subsequent criminal prosecution. To urge that this holding should apply to statements made by a State parolee during a lawful arrest is to utterly distort its meaning; to say nothing of the fact that the acts petitioner claims to have violated the rule of *Mapp* and *Wong Sun* occurred in 1960, well before these decisions were handed down.

Ker v. *California*, 31 U.S.L. Week 4611, 373 U. S. ——, decided June 10, 1963, does not advance petitioner's position. It upheld the validity of an arrest where the justification for proceeding without a warrant was if anything, less clear than in the case at bar; and went on to sustain the conviction.

The plain fact is that, as both the State courts and the United States Court of Appeals specifically found, petitioner, in answer to his parole officer's questions as to his large bank balance, volunteered the information that he had been arrested for gambling (42a, 66a) in order to provide an explanation for his deposits. Clearly, the police and parole officer had the right to question petitioner, in view of their apprehension of Andreyev a few hours before, and the information petitioner himself supplied—conveniently denied at the habeas corpus hearing—was not obtained from him in contravention of the Fourteenth

Amendment. This assertion was never raised in the State courts or the District Court and we submit it is the flimsiest of afterthoughts.

Similarly, petitioner's contention that he was not represented by counsel at the statutory parole violation hearing (Pet., p. 14) is not germane to this appeal and was not advanced below. Of course a parolee is in constructive custody even while outside prison walls, see *Jones* v. *Cunningham*, 371 U. S. 236 (1963), and it is fundamental that the constitutional right to counsel applicable to a criminal trial is not required in the case of a parole violation hearing. *People ex rel. Oddo* v. *Fay*, 13 N. Y. 2d —— (July 10, 1963). Indeed, the constitution does not require any hearing at all, *Escoe* v. *Zerbst*, 295 U. S. 490; *Hughes* v. *Heinze*, 268 F. 2d 864 (9 Cir.); and the right to counsel conferred by the Sixth Amendment does not even apply to Federal parole violation hearings, let alone State proceedings. *Martin* v. *U. S. Board of Parole*, 199 F. Supp. 542 (D.C.D.C.). The hearing held by the Division of Parole here was in full compliance with New York Correction Law, § 218, and in any event the proof of petitioner's parole violation is not reviewable under habeas corpus, as both the District Court and the Court of Appeals properly held. 316 F. 2d, at page 605; *cf. Lopez* v. *Madigan*, *supra*, 174 F. Supp. 919. This proof was based on court and police records and it is plainly unassailable here. In passing, *People* v. *Waterman*, 9 N. Y. 2d 561, cited by petitioner, dealt with the right to counsel in post-indictment questioning prior to a criminal prosecution, and is irrelevant to this case.

Petitioner's claim that the parole violation warrant was too vague (Pet., pp. 14-15) is neither properly raised nor relevant. The argument was never raised in the State courts, and was only parenthetically referred to in the District Court (43a). It, too, has nothing to do with the issues in this case as defined by the Courts below. Moreo-

over, an objection to the form of the warrant lodged against petitioner is not a valid ground for habeas corpus, even had it been properly raised, just as the writ may not be used to attack the validity of an indictment or information. *U. S. ex rel. Sprach* v. *Ragen, supra*, 246 F. 2d 264; *cf. Winston* v. *U. S.*, 224 F. 2d 337 (2 Cir.), cert. den. 350 U. S. 916.

People v. *Oskroba*, 305 N. Y. 113, cited by petitioner, has nothing to do with this case. It concerned a probation violation hearing before the sentencing court, in which the statute (Code Crim. Proc. § 935) guarantees the probationer "an opportunity to be heard." The Court of Appeals properly there sustained both the factual basis for the revocation of probation and the procedure employed, specifically holding no formal hearing was necessary, 305 N. Y., at p. 117. Surely, there is nothing unconstitutional in the fact that the New York Legislature has determined that probation, imposed by the Court, shall be revoked by the Court, while parole, granted by the Board of Parole, shall be revoked by that body. The parole statute (Correction Law § 218) also requires an opportunity to be heard, and this was afforded petitioner at the parole board hearing of April 20, 1960.

The assertion that the parole board hearing was held in April, 1960 rather than March (Pet., p. 15) amounts to a grasping at straws. Petitioner was arrested February 25, 1960 (21a) and returned to State prison *March 25, 1960*, as he himself concedes (Pet., p. 6). Thus, the hearing was held at the next meeting of the parole board after his return to State prison, just as Correction Law § 218 then required. The plain language of the statute provides that the parole court be held at State prison, and not in the New York City House of Detention where petitioner remained from February 25 to March 25 (23a). Petitioner continually refers to a supposed "delay" in the holding of the parole court hearing, trying to create the impres-

sion that the Parole Board was dilatory, when in point of fact it was petitioner himself who—in plain breach of his agreement, and hence itself a ground for revocation of parole—failed to disclose his arrest and conviction to the parole authorities for over four years. The Court of Appeals laid to rest any doubt which could have existed as to this point by specifically finding as a fact that "there was uncontroverted testimony that it was only upon Weber's admission that the parole officials learned of his arrest and conviction for the first time." 316 F. 2d, at p. 605.

Finally, petitioner's argument that the fact that the State of New York, rather than the Warden, prosecuted the appeal from the District Court in some way deprived the Court of Appeals of jurisdiction, is unworthy of serious consideration. The Warden's interest in petitioner is custodial only; and the People of the State are a proper party on appeal. Of course the State is the real party in interest. *Knewel* v. *Egan*, 268 U. S. 442; *cf. U. S. ex. Williamson*, 255 F. 2d 512, 515 (5 Cir.). Both the State and the Warden are represented by the Attorney General in any event. To speak of Warden "Fay's failure to prosecute the appeal" (Pet., p. 16) is to attempt to employ trivia and ignore the merits of the controversy. *Commanding Officer, U. S. Army Base* v. *U. S. ex rel. Biananis*, 207 F. 2d 499 (6 Cir.), which dealt with military authorities, and in which a motion to dismiss was timely made, unlike the case at bar, is clearly not in point. Petitioner's counsel entered into stipulations with counsel for respondent during the pendency of the appeal in the Court of Appeals and never moved to dismiss. Moreover, New York Civil Practice Act, § 1274 requires that an appeal be taken in the name of the People of the State of New York. Indeed, under New York law the Warden is not a proper appellant in this situation. *People ex rel. Berman* v. *McDonnell*, 269 App. Div. 864 (2nd Dept.).

None of the arguments advanced by petitioner raise any substantial question which would warrant the taking of jurisdiction by this Court. The decision of the Court of Appeals was plainly rendered on a factual basis, and petitioner's assertions represent an attempt to create broad issues of law where none were passed on below.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, N. Y., July 18, 1963.

Respectfully submitted,

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